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Supreme Court
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Case No. 95-705

OCTOBER TERM 1994

IN THE

SUPREME COURT OF THE UNITED STATES

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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58 pp.

INTRODUCTION: THE QUESTION PRESENTED

Contrary to the Attorney General's assertion, the United States Court of Appeals for the Eleventh Circuit has never interpreted Brecht v. Abrahamson or O'Neal v. McAninch to mean that relief should be granted when there exists "any doubt" about the effect of an error at capital sentencing. The Eleventh Circuit consistently has applied Brecht/O'Neal to deny relief when the petitioner has not shown that constitutional error had a "substantial" "injurious" effect on the sentence. The Eleventh Circuit and the District Court found that the constitutional error in Frank Smith's capital sentencing proceedings was "substantial," "injurious," "significant" and "grave," that it "infected" the proceedings; and that it "had a substantial effect on the outcome." The Eleventh Circuit and the District Court thoroughly evaluated the facts, the full record and the State's arguments, and they specifically applied the Brecht/O'Neal standard. They found that this jury was not allowed to consider and defense counsel was restrained from presenting "substantial," "significant" and "credible" mitigating evidence at capital sentencing. These findings of fact are not clearly erroneous.

"In this capital case, the state trial judge prevented defense counsel from presenting and the jury from considering mitigating circumstances. . ." Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992), relying on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987). Given the compelling and unchallenged nature of the mitigating evidence the jury was not allowed to consider and the entirety of the record in this case, the District Court and Court of Appeals found that the constitutional error "had a substantial effect on the outcome of Smith's sentence." Smith v. Singletary, 61 F.3d 815, 819 (11th Cir. 1995) (emphasis added), relying on Brecht v. Abrahamson,

113 S.Ct. 1710 (1993), O'Neal v. McAninch, 115 S.Ct. 992 (1995), and Kotteakos v. United States, 328 U.S. 750 (1946).[1]

The District Court and Court of Appeals found that the proceedings resulting in Frank Smith's death sentence were "infected" with constitutional error. The mitigating evidence which the jury was foreclosed from considering includes evidence that came out during the trial proceedings but that the jurors were not allowed to consider because the jury instructions precluded their consideration and evidence that defense counsel was not allowed to present because of the restrictive interpretation the trial judge afforded to mitigation. The Attorney General did not contest the veracity of the mitigation the jury was precluded from considering in any court in which this case has appeared. See e.g., Smith v. Dugger, 758 F. Supp. 688, 694 (N.D. Fla. 1990) ("[T]he State neither addresses this ... mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible. ...[T]he State neither contests the veracity of the proffered evidence nor offers any explanation ... about why the evidence would not have influenced the jury to recommend a life sentence.").

The Florida Supreme Court itself now relies on "Judge Stafford's learned analysis ... in Smith" when it evaluates claims of Hitchcock error. See Meeks v. Dugger, 576 So. 2d 713, 719 (Fla. 1991) (Kogan and Barkett, JJ., concurring). This case presents no controversy suggesting that the Attorney General's petition should be granted.

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1. The District Court Judge in this case was Chief Judge Stafford of the Northern District of Florida. The unanimous Eleventh Circuit panel was comprised of Chief Judge Tjoflat, Judge Hatchett and Judge Edmondson.

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STATEMENT OF THE CASE

The State's petition broadly asserts the Attorney General's displeasure with the result in the District Court and Court of Appeals. The petition, however, is not faithful to the actual rulings of those courts.

a. The District Court

"In this capital case, the state trial judge prevented defense counsel from presenting and the jury from considering mitigating circumstances not listed in the Florida death penalty statute." Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992). The District Court found that the mitigating evidence the jury was precluded from considering was "substantial," "significant" and "credible;" that the constitutional error "infected" these proceedings; that it had a "substantial" and "injurious" effect; and that it was "harmful" under the Brecht/Kotteakos standard. Dist Ct Orders, Pet. App. A12, et seq., and App. A23, et seq.

The District Court found that there are "substantial," "significant," "credible" and reliable mitigating factors in this case which the jury was not allowed to consider. The District Court found that the nonstatutory mitigation in the original record was not considered because of the preclusive jury instructions. The District Court also found that additional mitigation was not developed or presented because of the constraints imposed on defense counsel. The District Court found that constitutional error "infected the sentencing process" and that the error was "harmful" under Brecht/ Kotteakos. Dist. Ct. Order, Pet. App. A17-19. The Court of Appeals affirmed the District Court's findings of fact. See Smith, 970 F.2d at 766 ("Our review indicates that the record well supports the district court's findings of fact..."); Smith v. Singletary, 61 F.3d 815, 818 n.1 (11th Cir. 1995) ("the district court did not clearly err in making its findings of fact. . .").

The District Court's findings of fact are not clearly erroneous. They are amply supported by the record, are based on substantial evidence and were rendered with careful and due consideration to the record as a whole and to the parties' submissions and arguments. The State presented no argument under the "clearly erroneous" standard in its Eleventh Circuit brief and has made no reference to that standard in its current certiorari petition. The District Court's findings are not clearly erroneous and they should not be disturbed. See Amadeo v. Zant, 486 U.S. 214 (1988).

The District Court found that the constitutional error was "harmful under the standard announced in Kotteakos" (Dist. Ct. Order, Pet. App. A19); that "[a]t the very least, a grave doubt exists as to whether the Hitchcock error substantially influenced the jury's decision" (id. at A17); and that under the circumstances of this case "this court cannot say, with fair assurance, that the error did not have a substantial and injurious effect upon the jury's decision..." (Id. at A18).

Chief Judge Stafford presided throughout the habeas corpus proceedings in this case. As his orders demonstrate, he thoughtfully considered each of the relevant precedents of this Court and the Eleventh Circuit Court of Appeals, see Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992) ("[T]he district court faithfully applied the Supreme Court's and this circuit's precedents..."); discussed those precedents; evaluated the entire record; analyzed the arguments presented by Mr. Smith and by the State; reviewed all of the evidence; rendered findings of fact; and applied the appropriate eighth amendment analysis of this Court and the Eleventh Circuit Court of Appeals to those facts.

Chief Judge Stafford's findings of fact included his finding that "substantial" nonstatutory mitigation is involved in this case and his underlying findings that the mitigation is reliable and credible; that the jury was not allowed to consider the mitigation included in the original trial record; and that the operation of the jury instructions, the trial court's preclusive rulings and the restrictive consideration that Judge Padovano -- Mr. Smith's trial counsel -- knew would be afforded to

nonstatutory mitigating evidence constrained, inhibited and interfered with the efforts of defense counsel. Counsel's "tactical decisions were made in the context of the law as it then existed" -- he "developed both his strategies as well as his arguments under the constraints of [the restrictive] jury instruction" then in effect. Smith v. Dugger, 758 F. Supp. 688, 695 (N.D. Fla. 1990) (emphasis added). Chief Judge Stafford found that "trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction;" that "[i]n fact, as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors", Smith, 758 F. Supp. at 695-96; that "there was substantial, significant nonstatutory mitigating evidence available to Smith that, but for the erroneous instruction, trial counsel would have introduced. . ." (District Court Order, Pet. App. A17); and that mitigating evidence was not introduced or considered "because of the constraints imposed upon the entire sentencing process by the Hitchcock error." (Id. at A18) (emphasis added).

The District Court evaluated the entire record, including the trial and sentencing transcripts; former counsel's affidavit about the constraints under which he operated[2]; the state trial court's preclusive rulings; former counsel's testimony about this case at a prior hearing; and the Attorney General's arguments, including the State's concession of error under Hitchcock v. Dugger, 481 U.S. 393 (1987).

The District Court also considered the nature of the offense and the aggravating factors. It found that the error had a substantial and harmful effect under Brecht. Dist. Ct. Order, Pet. App. A17-19. And it noted that "under the law ... the State of Florida is required to do more than point

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2. Counsel's affidavit discussed in detail the constraints and restrictions on the presentation of nonstatutory mitigating evidence under which he was forced to operate. In the District Court, the State conceded that the affidavit was truthful. The District Court found that the account of trial counsel (now a state circuit judge) was consistent with the record and credible.

... [to the] crime in order to defeat Petitioner's claim for relief." Smith, 758 F. Supp. at 696. In fact, the mitigating factors the jury was foreclosed from considering included the facts that "Smith tried to dissuade . . . Johnny Copeland from killing the girl"; "the defendant did not personally kill the victim"; and "the defendant was influenced by the dominant personality of his accomplice." Smith, 61 F.3d at 817 (quoting District Court orders) (emphasis added).

The District Court reviewed the nonstatutory mitigation which the State conceded was in the original trial record, but which the jury was not allowed to consider because of the unconstitutional instructions. See Penry v. Lynaugh, 109 S.Ct. 2934, 2951 (1989) (instructions must allow jury to "give effect" to mitigation). The District Court also reviewed the mitigating factors which trial counsel did not present because of the constraints under which he was forced to operate. Chief Judge Stafford found that both the mitigation in the original record (which the jury was not allowed to consider under the instructions), and the mitigation which Mr. Smith presented during collateral proceedings (mitigation which trial counsel was constrained from developing and presenting), was credible and reliable. "[S]ubstantial nonstatutory mitigating evidence exists in this case." Smith, 758 F. Supp. at 696.

Chief Judge Stafford noted that although the State "conceded" in the District Court that there was mitigation in the trial record, the State never explained "why this court might find such evidence to be insubstantial or incredible." Smith, 758 F. Supp. at 694. Chief Judge Stafford also noted that as to the additional mitigation which counsel did not develop and present because of the constraints under which he operated, "the state neither contests the veracity of the evidence nor offers any explanation --- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence." Smith, 758 F. Supp. at 694. Either basis, the District Court concluded, establishes Mr. Smith's entitlement to relief.

b. **The Court of Appeals**

The Court of Appeals agreed with the District Court that Mr. Smith was entitled to relief on each ground: a) because "the state trial judge prevented defense counsel from presenting ... mitigating circumstances ...,"; and b) because, as to the mitigation which came out at trial, "the state trial judge prevented ... the jury from considering mitigating circumstances ...." Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992). The Court noted that "the district court did not clearly err in making its fact findings. . ." Smith v. Singletary, 61 F.3d 815, 818 n.1 (11th Cir. 1995). The Court wrote:

> "[I]n capital cases, 'the sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence." Hitchcock, 481 U.S. at 394, 107 S.Ct. at 1822 (quoting Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986)). The state concedes that the sentencing court committed a Hitchcock error in this case.
>
> * * *
>
> In determining whether a Hitchcock error is harmless, a habeas corpus court must consider both the mitigating evidence presented at sentencing as well as mitigating evidence that could have been presented, but which "the state trial court prevented the petitioner from presenting." Aldridge v. Dugger, 925 F.2d 1320, 1329 (11th Cir.1991). . . .
>
> * * *
>
> In this case, the state concedes that defense counsel made the following four arguments to the jury, which did not receive appropriate consideration due to the Hitchcock violation: "(1) the defendant did not personally kill the victim, (2) the defendant was only fifteen years old when he committed his prior robberies, (3) the defendant had been drinking gin and smoking marijuana the evening of the crime, and (4) the defendant was influenced by the dominant personality of his accomplice." Smith, 758 F.Supp. at 693. In addition to these four circumstances, the district court reviewed the record and various proffers, and found that the sentencing court precluded the presentation of the following ten mitigating factors:
>
> > [5] Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; [6] Smith was guilty under the felony murder doctrine; [7] a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or

ten years, even though he too was guilty of the same three underlying felonies.... ... [8] [Smith] had a long-term history of alcohol and substance abuse; [9] [Smith] suffered from grand mal epilepsy; [10] [Smith] was, for all practical purposes, abandoned by his mother and abused by his grandmother; [11] [Smith] had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; [12] [Smith] was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; [13] [Smith] was known to be non-violent, meek and soft- spoken; and [14] [Smith] was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

Smith, 758 F.Supp. at 694.

* * *

When reviewing trial errors for harmlessness, federal habeas corpus courts no longer utilize the Chapman "harmless beyond a reasonable doubt" standard; instead, they must apply the less onerous standard described in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). See Brecht, --- U.S. at ----, ----, 113 S.Ct. at 1714, 1722. "Hitchcock errors are 'trial errors' governed by Brecht." Horsley, 45 F.3d at 1492; see also Bolender, 16 F.3d at 1567. Therefore, we must decide whether the Hitchcock error in this case "had substantial and injurious effect or influence in determining" Smith's death sentence. Brecht, --- U.S. at ----, 113 S.Ct. at 1712 (quoting Kotteakos, 328 U.S. at 776, 66 S.Ct. at 1253).

* * *

Given the district court's factual determinations concerning the wealth of mitigating evidence that was both presented and precluded, we can only conclude that the Hitchcock error in this case had a substantial effect on the outcome of Smith's sentence.

Smith, 61 F.3d at 817-19 (emphasis added).

c. **The Facts**

"The state concedes that the sentencing court committed a Hitchcock error ..." Smith, 61 F.3d at 817.

i. **Jury Error**

At sentencing the trial court first informed the jury that it would instruct them "on the factors in aggravation and mitigation that you may consider" (ROA 2721).[3] The same instruction was given to the jury in Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 1824 (1987) (trial court instructs jury initially that it would later instruct "on the factors in aggravation and mitigation that you may consider under our law").

The trial court's later instructions directed:

> The mitigating circumstances which you may consider, if established by the evidence, are these: [providing limited list of statutory factors]....

(ROA 2767). This is the same instruction as the one found to violate the eighth amendment in Delap v. Dugger, 890 F.2d 285, 303-04 (11th Cir. 1989), cert. denied, 110 S.Ct. 2628 (1990), and is virtually the same as the one provided to the Hitchcock jury. See Hitchcock, 107 S. Ct. at 1824 ("[t]he mitigating circumstances which you may consider shall be the following..."). As in Hitchcock, the jurors in Mr. Smith's case were instructed that they were limited to the listed statutory factors. Nothing else could be considered under the instructions.

The prosecutor argued to the jury that it could only consider statutory factors and nothing else in mitigation (Petition for Writ of Habeas Corpus at 22-23, quoting ROA 2741, 2745-47). The trial court denied counsel's pretrial motion challenging the restrictive nature of the proceedings and ruled that the mitigating "circumstances" the jury would be allowed to consider were limited to the

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3. "ROA" refers to the record on direct appeal to the Florida Supreme Court.

restrictive statutory list. Before sentencing, defense counsel knew that the jury's consideration would be limited -- the trial court had so ruled. Chief Judge Stafford found that counsel's presentation was infected by the restrictive consideration he knew would be provided to mitigating evidence.

ii. Judge Error

Early on in the proceedings, the trial judge denied defense counsel's challenges to the limiting statutory construction and limiting jury instructions then in effect (See Appendix B (2) to Petition for Writ of Habeas Corpus) (reproducing relevant transcript). Thereafter, he made no comments indicating that he would allow the jury to consider or would himself consider "nonstatutory" mitigating factors. The judge's instructions to the jury were preclusive. A sentencing judge is presumed to follow his jury instructions. See Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988); Daugherty v. Dugger, 839 F.2d 1426 (11th Cir. 1988).

Mirroring the judge's review in Hitchcock, the sentencing judge in Smith restricted himself only to those mitigating factors listed in the statute:

> MITIGATING CIRCUMSTANCES (F.S. 921.141(6))
>
> The Court finds that the mitigating circumstances enumerated in F.S. 921.141(6)(a)(b)(c)(d)(e) and (f) do not apply in that: [The sentencing court then listed and rejected the statutory mitigating circumstances included in Florida Statute Section 921.141(6)(a) through (f), while finding "age," factor (g), applicable.]

(ROA 552). The wording is identical to that in Hitchcock, and reflects that only that which fit the statute ("F.S. 921.141 (6)") was considered.

As in Hitchcock, "age" (statutory factor "g") was found as a mitigating factor (See ROA 552). The judge ruled the statutory mitigating factors insufficient to outweigh the aggravating factors and sentenced Mr. Smith to death (ROA 552).

It is clear here as it was in Hitchcock that the judge considered only "the mitigating circumstances enumerated" in Fla. Stat. sec. 921.141(6) (ROA 552)(emphasis supplied). See Hitchcock v. Dugger, 107 S. Ct. at 1823-25 (mitigating circumstances "as enumerated in Florida Statute 921.141(6)" insufficient "to outweigh the aggravating circumstances" [emphasis in original]). The heading of the "Mitigating Circumstances" section of the sentencing order itself shows that only "F.S. 921.141(6)" -- i.e., statutorily listed -- mitigating circumstances were considered (ROA 552). The judge's actions at sentencing in this case track those of the judge in Hitchcock.

iii. Record Mitigation

The District Court found that "substantial" nonstatutory mitigating evidence existed in the record of this case, but that the jury was not allowed to consider this evidence. The District Court also analyzed the State's argument "that this case is similar to . . . [cases] which resulted in findings of harmlessness because there were no mitigating factors. If . . . the State is suggesting that there simply is no nonstatutory mitigating evidence in this case, the record belies such suggestion." Smith, 758 F. Supp. at 694. The District Court listed the substantial factors from the "evidence in the record from which" a jury could have found nonstatutory mitigation. Smith, 758 F. Supp. at 694. The evidence was reliable and credible and, as to the State's arguments, which he characterized as "difficult to discern" (id. at 694), Chief Judge Stafford further noted, "While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the State neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible." Smith, 758 F. Supp. at 694.

"Substantial nonstatutory mitigating evidence exists in this case." Smith, 758 F.Supp. at 696. It includes the following:

i) Ample evidence was elicited at the trial that Mr. Smith never intended to kill Sheila Porter (ROA 2299-2300, 2266-68, 2272-73, 2314, 2318-19),[4] and that he did not kill Sheila Porter -- codefendant Johnny Copeland did while Mr. Smith was trying to stop him (ROA 2272-73, 2266-68, 2300, 2318-19, 2313-14). Substantial evidence was adduced that Mr. Smith tried to persuade Copeland that he should not kill the decedent (ROA 2266-68, 2272-73, 2300, 2313-14, 2318-20). At the scene of the homicide Copeland had the pistol (ROA 2268).[5] Mr. Smith tried to convince Copeland not to kill the girl (ROA 2313-14, passim), telling him "just to give [her] the money back" (ROA 2268, 2313-14), and to leave her alone (ROA 2313-14), and to "take the girl back" (ROA 2314). Mr. Smith's jury, a jury that could only have convicted on the basis of a felony murder/accomplice liability theory, see Smith v. State, 424 So. 2d 726, 731-32 (1982); that deliberated a great length; that had obvious reservations about Mr. Smith's participation in the murder; and that did not believe that Mr. Smith was the triggerman (see ROA 2711-13 [jury questions to court during deliberations]), was precluded from considering any of this at sentencing. Mr. Smith's efforts to "dissuade . . . Copeland from killing the girl" (Smith, 61 F.3d at 817); his lack of intent to kill; the fact that "Smith was not the triggerman who killed the victim" (Smith, 758 F. Supp. at 694); and the fact that Copeland was "the dominant personality" (Smith, 61 F.3d at 817),

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4. Florida allows death to be imposed for "felony murder."

5. Records of a K-Mart store established that twenty-five caliber ammunition of the same brand that was used in the homicide was purchased shortly before the offense by Johnny Copeland (ROA 2326). Copeland's girlfriend, Florence Smith, testified that when the police came to arrest Copeland, she concealed a small black pistol under the front seat of his car (ROA 2505). Copeland had given her the pistol. Following the arrest, she gave the pistol to Copeland's mother. Daniel King testified that about a week before the offense, Johnny Copeland pawned a twenty-five caliber pistol to him for $20.00 (ROA 2510). He came to repay the loan on the Friday before the offense, secured the pistol, and, at the time, test fired it in Mr. King's yard (ROA 2544).

were substantial mitigating facts which the jury was foreclosed from considering, as the District Court and Court of Appeals found. Smith, 758 F.Supp. at 694; Smith, 61 F.3d at 817-18.

ii) The very fact that this was conceded (by the State at trial and sentencing and the Florida Supreme Court on direct appeal) not to be a premeditated murder case, but that the evidence showed, at best, felony-murder/accomplice liability, is also a fact that mitigated. The habeas petition explained that "[i]t is the status of the offender to which Lockett and Hitchcock speak" and that the "status of this offender is that he did not commit a premeditated murder," but that the "jury was not allowed to consider, as mitigation, that Mr. Smith's culpability was founded on the codefendant's acts and on the underlying felonies" (Petition, p. 30). In addition to discussing the fact that Mr. Smith did not pull the trigger and Mr. Smith's efforts to stop Copeland, the habeas petition also noted the following facts:

> As the evidence submitted in the appendix (e.g., Judge Padovano's affidavit; Department of Corrections records) reflects, and as the jury observed, at the time Mr. Smith was an undernourished 19 year old who looked like a child who had not yet reached puberty. Copeland was muscular and had a formidable appearar . Copeland also had the gun. Under such circumstances Mr. Smith, at the scene, did all that could be expected in his efforts to stop Copeland.

(Petition, p. 30 n. 4).

The District Court found this mitigating evidence reliable and explained that the fact that "Smith was guilty [only] under the felony murder doctrine" was another mitigating factor "in the record" which the jury should have been allowed to consider. Smith, 758 F. Supp. at 694.

iii) The only evidence which contradicted Mr. Smith's account of the events was the bargained-for accomplice testimony of codefendant Victor Hall. Hall's testimony was directly contradicted by Mr. Smith's account and was not corroborated by other evidence elicited at trial; Hall's status was that of an accomplice whose testimony was provided in exchange for a lesser

sentence -- i.e., as Hall himself admitted on the stand, he was testifying to avoid the electric chair (ROA 2317, et seq.; 2337-38, 2344, 2354 -79, 2397, passim); Hall was substantially impeached with written notes he and Copeland had passed to each other while in the jail pretrial which detailed their plan to have Hall, who did not testify at Copeland's trial, give fabricated testimony against Mr. Smith (ROA 2380-86, 2388, 2424-29, 2463, 2470); Hall provided numerous inconsistent statements in the past (ROA 2401-02, 2413, 2418-22, 2429-30, 2431-50, 2469). The jury should have been allowed to consider the mitigating effect of the fact that the only evidence implicating Mr. Smith in the capital offense came from an accomplice who had "every reason to lie" (ROA 2665), in order to save himself (See also ROA 2666-68, 2757). The instructions, however, did not allow the jury to consider, as mitigation, the fact that questions remained to be answered, because the prosecution was essentially based on bargained-for accomplice testimony, although numerous courts even in non-capital cases have noted the inherent unreliability of such testimony (See Petition at 31-33, discussing facts and listing numerous cases). Chief Judge Stafford and the Court of Appeals found that the jury should have been allowed to consider this evidence. Smith, 758 F.Supp. at 694. See also Smith, 61 F.3d at 817 ("a 'cooperating' accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty. . .").

iv) There was substantial evidence that Mr. Smith's capacity was diminished due to the consumption of alcohol and marijuana that evening (See, e.g., ROA 2255 [Mr. Smith, Hall, and Copeland "rode around, drinking Southern Comfort and gin" and smoking marijuana]). Hall testified to this, Mr. Smith's statements to law enforcement related this, and (although not heard by the jury but heard by the same judge in Copeland's trial, which took place prior to this one) Copeland also stated this. Nothing in the instructions permitted the jury to consider or give mitigating effect to these factors.

Although this evidence of diminished capacity did not rise to the stringent level required under Fla. Stat. sec. 921.141(6) ("extreme disturbance"), it was entitled to consideration.[6] However, consideration was not afforded to this mitigation independent of the statute's stringent criteria, although the "possibility" of inebriation at the time of an offense is a recognized nonstatutory mitigator. See Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988) ("Waterhouse proffered evidence that he ... was under the influence of alcohol [on] the night of the murder.... The jurors should have been allowed to consider these factors in mitigation"); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987) (intoxication and drug use may mitigate recommended sentence); Foster v. State, 518 So. 2d 901, 902 n.2 (Fla. 1988) ("some" evidence of alcohol use at time of offense).

The District Court found that among the "substantial" mitigating factors which the jury should have been allowed to consider was the evidence that "Smith may have been intoxicated at the time of the offense." Smith, 758 F. Supp. at 694. See also Smith, 61 F.3d at 817 (the jury should have been allowed to consider the evidence that "the defendant had been drinking gin and smoking marijuana on the evening of the crime.").

v) Relying on Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986) (jury could have relied on the nonstatutory mitigating effect of the life sentence given to a cooperating accomplice in exchange for his testimony), and to similar holdings in McCampbell v. State, 421 So. 2d 1072 (Fla. 1982), and Downs v. Dugger, 514 So. 2d 1170, 1172 (Fla. 1987) (lesser sentence given to accomplice is a recognized nonstatutory mitigating factor), Mr. Smith's habeas petition discussed the fact that Frank Smith was prosecuted to the utmost; that Victor Hall, as the jury heard, in

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6. Precedent in Hitchcock cases consistently holds that Hitchcock is violated when, because of the instructions, mitigating evidence is excluded from the jury's consideration "even if it did not find that the evidence met the required threshold level for a statutory mitigating factor," Delap, 890 F.2d at 305-06, or when the evidence, although mitigating, does "not rise to the level of the Florida statutory mitigating circumstances". Booker v. Dugger, 922 F.2d 633, 636 (11th Cir. 1991).

exchange for his testimony, was given special treatment -- no death penalty, concurrent sentences on the felonies, and the possibility of parole in "eight to ten years" (ROA 2393 [Testimony of Victor Hall: "Well, if I, you know, go to prison, you know, and keep a clean record, you know, I could be out, maybe, in eight to ten years or something like that"]); and that the jury should have been allowed to consider the effect of the disparate treatment given to Victor Hall and Mr. Smith.

The District Court found that the jury should have been allowed to consider that "a 'cooperating' accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty. . ." Smith, 758 F. Supp. at 694.

vi) In addition, the habeas petition discussed the State's trial evidence that Mr. Smith, from the moment of his arrest, provided law enforcement officers with statements expressing his remorse (e.g., ROA 2161-68); that he voluntarily submitted to a search of his person and vehicle, and voluntarily stayed at the police stationhouse (e.g., ROA 2318-19, 2273, 2261-68); that it was Frank Smith who helped law enforcement find the decedent's body (he went with the police and directed them to the area where Johnny Copeland killed the girl and aided the officers in discovering her body (e.g., ROA 2162-63, 2513-40)); and that Mr. Smith's willingness to cooperate -- i.e., voluntarily providing statements to law enforcement, directing law enforcement to the decedent's body -- also should have been considered as mitigation. (Petition for Writ of Habeas Corpus, pp. 37-39, citing Jordan v. State, 478 So. 2d 512, 513 (Fla. 1st DCA 1985) ("defendant's cooperation with law enforcement officers can be grounds for reducing or suspending a sentence"); Banzo v. State, 464 So. 2d 620, 622 (Fla. 2nd DCA 1984) ("cooperation can be grounds for reducing or suspending a sentence. . . ."); Caruthers v. State, 465 So. 2d 469, 499 (Fla. 1985) (death sentence not appropriate where there were nonstatutory mitigating circumstances, including voluntary confession).)

vii) The habeas petition discussed the 1974 robbery conviction introduced by the State at the penalty phase as an aggravating circumstance (ROA 2721-31). Mr. Smith received a state prison sentence. At the time of that conviction Mr. Smith was fifteen (15) years old (ROA 2753, 2757). Mr. Smith (whose undernourishment and small stature were observed by the jury) was sent to a state prison for adults. This horrific scenario, although not afforded consideration, also mitigated against a sentence of death as it related to the background of the defendant. See Petition for Writ of Habeas Corpus at 39, citing Burch v. State, 522 So. 2d 810 (Fla. 1988)(the fact that the defendant had been incarcerated as a youth is a valid nonstatutory mitigating factor). See also Smith, 61 F.3d at 818 ("Smith was mistakenly incarcerated at an adult institution when he was . . . 15.")

viii) The habeas petition (pp. 55-56) discussed an additional mitigating factor which the judge heard but the jury did not hear -- the State's vehement arguments in the Copeland trial that Copeland, not Mr. Smith, was the shooter and ringleader.

iv. The Constraints on Defense Counsel

The District Court found, inter alia, that "defense counsel's tactical decisions were made in the context of the law as it then existed;" that "[p]erhaps the court would think differently if there were reason to believe that counsel's strategies were not affected by the erroneous instruction" but there was no such reason; that "[t]he record makes it evident that counsel developed both his strategies as well as his arguments under the constraints of that jury instruction"; that "the record indicates that trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction"; that "as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors"; that trial counsel's affidavit "describing how his strategies were limited by the instruction which he knew would be given to the jury" and the District Court's independent findings from the record demonstrate that counsel's efforts

were inhibited; that "there was nonstatutory mitigating evidence in this case which . . . could have been presented . . . had the erroneous jury instruction not been given"; that the record reflects "that counsel's strategy would have been different had the case been tried post-Hitchcock"; that "[u]nder such circumstances" the Court could not accept the state's premise that "the denial of petitioner's ineffective assistance of counsel claim should, ipso facto, be used to deny petitioner's Hitchcock claim"; that "substantial mitigating evidence exists in this case"; and that as to the "'nonrecord' nonstatutory mitigating evidence, the state neither contests the veracity of the proffered evidence nor offers any explanation . . . about why the evidence would not have influenced the jury to recommend a life sentence." Smith, 758 F. Supp. at 695-96 (emphasis in original).

Chief Judge Stafford reiterated his findings of fact in his post-remand order:

> As this court previously found, there was substantial, significant nonstatutory mitigating evidence available to Smith that, but for the erroneous instruction, trial counsel would have introduced for the jury's consideration. . .
>
> * * *
>
> [N]onstatutory mitigating evidence . . . was not introduced . . . because of the constraints imposed upon the entire sentencing process by the Hitchcock error.

(Dist. Ct. Order, Pet. App. A17-18) (emphasis added).

Defense counsel for Mr. Smith was Philip J. Padovano (now a Circuit Judge in Florida's Second Judicial Circuit). At the time of Mr. Smith's capital proceedings, Judge Padovano's efforts to develop and present mitigation on Mr. Smith's behalf were constrained. The restrictive interpretation of "mitigation" was challenged by Judge Padovano early on in the proceedings, but the challenge was denied by the trial judge.

Although Judge Padovano attempted to explain to Mr. Smith's trial judge that Lockett v. Ohio, 438 U.S. 586 (1978), required capital sentencers to consider nonstatutory mitigating

circumstances, at the same time Judge Padovano was aware, and pointed out to the trial court, that the Florida Supreme Court's then-recent decision in Songer v. State, 365 So. 2d 969 (Fla. 1978), had held that the Florida capital sentencing statute -- and thus the jury instructions which gave effect to that statute -- satisfied Lockett. It was only after the issuance of this Court's decision in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987), that the Florida Supreme Court recognized that it had erred in Songer. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988). The trial court denied Judge Padovano's motion under Lockett. It ruled that the statutory criteria would apply.

Thus, Judge Padovano's hands were tied: the jury was to be instructed only on the statutorily enumerated factors; the trial court denied counsel's request to allow the jury to consider mitigating factors not listed in the statute; and, under the trial court's ruling, defense counsel's development and presentation of mitigating evidence had to be restricted to the "statutory" factors.

"In this capital case, the state trial judge prevented defense counsel from presenting . . . mitigating circumstances not listed in the Florida death penalty statute." Smith, 970 F.2d at 766. As a result of these constraints on counsel, "substantial" nonstatutory mitigating evidence was not presented to Mr. Smith's capital sentencing jury, and Mr. Smith was sentenced to death in violation of the eighth and fourteenth amendments. Smith, 758 F. Supp. at 695-96; Smith, 970 F.2d at 766.

Judge Padovano's affidavit discussed these facts:

> At the time I represented Mr. Smith, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Smith was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. The instructions to the jury and law at the time limited the mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to inform juries that they could consider other mitigating circumstances). I was aware of that limitation and prepared Mr. Smith's case accordingly. As I testified in an evidentiary hearing

held in Frank Smith's case in October, 1984, when asked questions concerning why I did not develop and present nonstatutory mitigating factors or to seek jury instructions on such evidence:

> [A]t the time [of Smith's trial and sentencing], we were operating under a court decision in Florida which said you had to stick to statutory mitigating circumstances. . . . Since then, the United States Supreme Court has held that that's unconstitutional. Then the Supreme Court of Florida wrote an opinion which said: Well, that's not what we really said anyway. But at the time I was following the law that was in existence then. I wasn't going to present another -- I guess I could have done it and had Judge Cooksey tell me: No, that's the law. You can't do it.

I in fact challenged the constitutionality of the statute, because the law and instructions limited the jury to the statutory factors, but that motion was denied early in my investigation, and subsequently during the proceedings. . . . [T]he statute and instructions then in effect tied my hands, and because of that statute, the standard instructions to capital sentencing juries then in effect, and Judge Cooksey's interpretation of that statute, I never developed, investigated, or presented nonstatutory mitigating evidence regarding Frank Smith, and did not -- could not -- seek instructions on such evidence. Since then, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), established that that interpretation of the Florida capital punishment statute was not constitutional. But that was the statute and instructions that I labored under at the time, and that statute, the instructions based on that statute, and its interpretation had a direct, adverse effect on my efforts on Frank Smith's behalf at the time.

Mr. Smith's capital trial and sentencing proceedings took place at a time when Florida criminal defense attorneys, prosecutors, and judges knew that the mitigating evidence on which the jury would be instructed at a capital sentencing proceeding w[as] restricted to the statutory list of section 921.141. Florida capital sentencing juries were limited strictly to the consideration of mitigating factors enumerated especially in Fla. Stat. sec. 921.141. Mr. Smith's jury was so instructed. I have always endeavored to operate in accordance with the applicable law. The irony of the situation is that the applicable law at the time tied my hands in Frank Smith's case. The restrictive instructions were in operation and were imposed upon and understood by practitioners and judges in Florida, and in particular, in the Second Judicial Circuit. Mr. Murry, my co-counsel during some

of the proceedings in Mr. Smith's case, shared this view. Our investigation, preparation, and presentation was restricted by these statutory constraints.

As a court appointed attorney with limited time and resources, I understood expending time and energy on an attempt to develop and prove evidence that would not be considered to be a waste of resources. I investigated, but my penalty phase investigation was limited by an effort to produce evidence that fit within the jury instructions and statute. It was mitigating evidence that fit within the statute that I attempted to develop, with regard to the statutory mental health factors, as well as with regard to other issues (for example, Mr. Smith's history of deprivation and poverty did not fit within the statute; neither did his withdrawal from the offense before the decedent was killed; neither did his history of alcohol and substance abuse). My focus was on uncovering evidence of those statutorily enumerated mitigating circumstances which were at the time the only ones on which the capital sentencing jury would be instructed. I did not pursue or develop nonstatutory mitigation because to do so would have been fruitless (the jury would not be instructed to consider such nonstatutory mitigating circumstances under the statute and thus such factors would not have been considered by the jurors, under the instructions then in effect, nor by Judge Cooksey, the sentencing judge). . . . My strategy as to the development of mitigating circumstances was quite simply what the law then mandated: I looked for evidence of the statutory circumstances because the law at the time precluded the consideration of any nonstatutory mitigating circumstances. No instructions on nonstatutory mitigating evidence were allowed.

My access to the assistance of a court-appointed mental health expert was also limited because there was no provision at the time for a confidential evaluation. Rather than share any information provided by an expert with the State, I obtained an advisory opinion from a local expert. I asked this expert to look at the issues of competency and sanity, and at the statutory mitigators, but never requested that he evaluate and assess Mr. Smith's background, character, or mental impairments in an effort to develop nonstatutory mental health mitigation for presentation to the court and jury. This was a direct result of the statutory constraints and jury instructions then in effect. If the trial were today, or if the law then had allowed for consideration of nonstatutory mitigating evidence such as was recently addressed in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), I certainly would have made the required showing of need of such confidential assistance and obtained the expert's help in developing the mitigation circumstances

present in Mr. Smith's case, particularly those nonstatutory mitigating circumstances which I knew could not be considered under the instructions and statute in 1978-79. A mental health professional would have provided great assistance in developing nonstatutory mitigating circumstances regarding Mr. Smith and his mental health impairments, particularly his brain dysfunction and history of epilepsy, and the effects of his childhood deprivation on his later functioning. I did not pursue such evidence then with the psychologist because of the statute's restraints. I also understand that Frank Smith's current counsel have retained Dr. Joyce Carbonell, who has evaluated Mr. Smith and tested whether he has mental impairments. I certainly would have used such nonstatutory psychological/psychiatric mitigating evidence at the time of the 1978-79 proceedings if the statute, instructions, and law had then allowed it. Indeed, I consider Dr. Carbonell to be a qualified and highly professional mental health practitioner, and have retained her services and requested that she provide me with an opinion on nonstatutory mitigating mental health evidence since the time of Frank Smith's trial. I would have asked for expert opinions on these issues in Mr. Smith's case in 1978-79, and would have provided the evidence to the jury and judge. The statute, however, strapped my efforts.

If the proceedings were today, I certainly would have presented as a nonstatutory mitigating circumstance the disparate treatment afforded Mr. Smith's co- defendant, Victor Hall. Hall stated that he was going to receive a sentence of years, and would be eligible for parole in eight to ten years. The jury may have convicted Mr. Smith on the felony murder theory presented by the State, because of the co-defendant's testimony. Certainly any doubts the jury had about the respective roles the co-defendants (Copeland, Smith, and Hall) played in the crime could have been used to compellingly argue that this death penalty was inappropriate for Mr. Smith when one co-defendant under his plea agreement would be receiving so much less, and the other co- defendant (Copeland) was shown by the evidence to be the more culpable party. The then-prevalent law, however, strapped my efforts.

The jurors in fact asked questions of the judge at the end of the trial indicating that they were uncertain of Frank Smith's level of complicity. The defense at trial was that Frank Smith withdrew from the offense before the homicide occurred. At the trial on guilt-innocence, the judge denied a requested instruction concerning the withdrawal defense -- that Mr. Smith attempted to dissuade Copeland from killing the victim and communicated his withdrawal to Copeland. As I testified at the 1984 evidentiary hearing noted above,

I never requested an instruction on Mr. Smith's withdrawal to be provided to the jury at the sentencing phase because the law did not allow it then. I would have requested such an instruction, and would have strenuously argued Mr. Smith's withdrawal even under the standard nonstatutory mitigating evidence instruction put in effect after Mr. Smith's trial, if the law had then allowed the jury to consider such factors.

Another area that I certainly would have explored in an effort to uncover nonstatutory mitigation would have been the relationship between Mr. Smith and Mr. Copeland. At the time, there was evidence that Mr. Copeland was the more dominant personality. Domination could have been further developed and argued as nonstatutory mitigation justifying the imposition of a sentence of less than death. There was obvious evidence of this. For example, Mr. Smith was small in stature; Mr. Copeland was well-developed and had a threatening stature and demeanor. However, because I was aware that the law in effect at the time did not permit the consideration of nonstatutory mitigation, I did not pursue such evidence and instead focused my attention on the development of statutory mitigating circumstances. My argument was presented in terms of the statute and jury instructions. Mitigation concerning the fact that Frank Smith was the follower (for example, background and historical evidence that Copeland had always been the leader and Smith the follower, from their younger days, and even in a prior offense) did not rise to the statutory level, and thus was not developed because it would not have been considered. Other information concerning Mr. Smith's character and background also could have been developed and presented had the statute not tied my hands -- Mr. Smith grew up in stark poverty, an epileptic child, was malnourished and diminutive, and was incarcerated in adult prison facilities at the age of 15 with grown men. These and other factors of nonstatutory mitigation were not developed or presented because of the statute's constraints. My argument focused exclusively on the statutory aggravating and mitigating factors. This affidavit reflects some of the matters that I would have attempted to develop but for the statute then in effect. In short, I can state that if the proceedings were conducted under the post-Hitchcock understanding of lawyers and judges, and under the post- Hitchcock instructions, my approach and presentation at the sentencing phase would have been considerably different.

In sum, the statute, the standard jury instructions, the trial court's construction, and the then-prevalent law and standards of practice in Florida and particularly in the Second Judicial Circuit strapped me and inhibited my efforts, and detrimentally affected what

> I was able to develop, investigate, and present on Frank Smith's behalf.

(App. A (1) to Petition for Writ of Habeas Corpus, Affidavit of Judge Padovano.)

Judge Padovano's affidavit is consistent with the record of Mr. Smith's trial and with the record of prior post-conviction proceedings in this case. As Judge Padovano's affidavit explains, shortly after he assumed Mr. Smith's representation, he filed a motion challenging the constitutionality of the Florida capital sentencing scheme in light of Lockett. At the hearing on that motion, Judge Padovano argued:

> There are three new death penalty arguments that we are making, that to my knowledge have not been previously made in trial courts, challenging the death penalty. The first of which I will give you very quickly because the Supreme Court of Florida ruled on it last week. It's the argument that the Florida statute is unconstitutional as a violation of the eighth amendment because it does not permit consideration by the trial judge of non-statutory mitigating circumstances. Now, our supreme court held in State vs. Cooper, at 336 Southern Second, 1133, that the mitigation circumstances set forth in the capital sentencing statute are exclusive; that is to say that the Court can not consider any others. Several months ago the United States Supreme Court in the case of Lockett vs. Ohio, which is cited in my memorandum, held that an Ohio statute which precluded consideration of non-statutory mitigating circumstances is invalid as a violation of the eighth amendment. I would submit that for the reasons that the Ohio statute was declared unconstitutional by the United States Supreme court, that the Florida statute is likewise unconstitutional. Unfortunately for my argument, Your Honor, and I will tell you this in all candor, the Florida Supreme court ruled about two weeks ago in the case of Sangar [sic] vs. State, that they really didn't say that in the previous case of State vs. Cooper, and that the Florida statute doesn't preclude consideration of non-statutory mitigating circumstances. So again I would submit that argument. I wanted to let you know what it is, but I also want to let you know in all candor that several weeks ago the Supreme Court ruled against our position on that argument. . . . I do feel it is my obligation to present it to the Court. I certainly do not think that this Court has the power to overrule the Florida Supreme Court in Sangar vs. State [sic].

(App. B(2) to Petition for Writ of Habeas Corpus, pp. 137-38).

Judge Padovano argued to the trial court that although Lockett required consideration of nonstatutory mitigating factors, the Florida Supreme Court's decision in Songer had held that the Florida statute -- and the jury instructions emanating from it -- somehow complied with Lockett. Thus, he was forced to concede that under the law then in effect in Florida ("Unfortunately for my argument"), binding upon the trial court ("I certainly do not think that this court has the power to overrule the Florida Supreme Court"), the jury instructions as written had been upheld and the Florida Supreme Court believed them to allow for sufficient consideration of mitigating factors. In Hitchcock, this Court held that Judge Padovano's, not the Florida Supreme Court's view of the eighth amendment was right. But the unconstitutional construction was the one under which Judge Padovano was forced to operate at the time of Mr. Smith's trial.

At that same hearing, the State said:

> The Supreme Court in [Lockett] reversed the death penalty solely because the Ohio Statute do[es] not provide for [statutory] mitigating factors, as does the Florida statute in Sangar vs. State [sic]....

(App. B(2) to Petition for Writ of Habeas Corpus, p. 145).

The trial court denied the defense motion and ruled that only the statutory factors would be afforded consideration (Id.).

Thus, from the outset of his representation of Mr. Smith, Judge Padovano understood that the jury would be instructed only on the statutory mitigating factors -- the trial court ruled that only "statutory" factors could be heard.

The fact that Judge Padovano's investigation and preparation for the penalty phase were guided by this statutory restriction is also confirmed by counsel's pretrial Motion for Mental Examination (App. B(1) to Petition for Writ of Habeas Corpus). In that motion, Judge Padovano explained that in light of the trial court's rulings, he wanted an examination for statutory mental health

mitigating factors. Counsel understood that the jury would be allowed to consider only mental health evidence relevant to the statutory criteria and, as his motion acknowledged, was put in the position of only pursuing "statutory" evidence.

In his penalty phase closing argument Judge Padovano then focused exclusively on the statutory mitigating factors, repeatedly referring to "these" mitigating circumstances and attempting to fit the evidence into the statutory criteria (ROA 2748, 2749, 2750, 2751, 2757). As the District Court noted, Judge Padovano's argument "tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors." Smith, 758 F. Supp. at 695. The jury instructions did not include any suggestion that the jury could consider nonstatutory mitigation.

Judge Padovano's testimony during the prior proceedings on the ineffective assistance claim is also consistent with his affidavit, the trial record and the findings of Chief Judge Stafford -- who presided over the ineffective assistance of counsel proceedings in this case. At the evidentiary hearing, Judge Padovano testified that at the time of Mr. Smith's trial he understood that statutory mitigating factors were the only ones the jury would be allowed to consider (Petition for Writ of Habeas Corpus, pp. 71-72, quoting testimony). In accordance with this view, Judge Padovano testified that he consulted a psychologist at the time of trial pursuing solely statutory factors (id., citing Hearing Tr. 69, 76-77, 83-87), but that he did not attempt to develop or introduce a wide variety of mental health and other available nonstatutory mitigating evidence regarding Mr. Smith because introduction of such evidence would not have been allowed (Id.) "[A]t the time I was following the law that was existent then ... I guess I could have done it and had Judge Cooksey tell me: No, that's the law. You can't do it ..." (Id.).

In the District Court, the State conceded that Judge Padovano was truthful in his affidavit. Chief Judge Stafford's findings about the constraints under which Judge Padovano operated are

founded on a wealth of evidence. As the Eleventh Circuit noted "the record well supports the district court's findings" that "[i]n this capital case, the state trial judge prevented defense counsel from presenting ... nonstatutory mitigating circumstances ..." Smith, 970 F.2d at 766. "The district court did not clearly err in making its findings of fact." Smith, 61 F.3d at 818 n.1.

v. **Mitigating Factors Which the Jury Did Not Hear Because of the Constraints**

The District Court found that among the "substantial mitigating evidence" which exists in this case, Smith, 758 F. Supp. at 696, were factors which the jury did not hear because "defense counsel [was] constrained by the court's erroneous instruction." Id. at 696. These factors would have been "presented by counsel and considered by the jury had the erroneous jury instruction not been given." Id. at 695. "[C]ounsel's strategy would have been different" had the jury been allowed to consider nonstatutory mitigating factors. Id. at 695. As Judge Padovano testified at the hearing and attested to in his affidavit, he would have presented the nonstatutory mitigating evidence if the jury would have been allowed to consider such factors (See Petition for Writ of Habeas Corpus, p. 124, quoting transcripts).

Finding that the nonstatutory mitigating factors in this case were "substantial," Smith, 758 F. Supp. at 696, and based on credible and reliable evidence, Chief Judge Stafford addressed the State's arguments:

> [T]he state neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

Smith, 758 F. Supp. at 694. The mitigating factors were supported by a wealth of relevant, admissible, and persuasive evidence, including sworn affidavits, historical records, mental health

evaluations from highly qualified practitioners, and other records. The evidence was collected in the voluminous Appendix filed with Mr. Smith's Petition for Writ of Habeas Corpus.

Chief Judge Stafford provided a summary concerning the mitigating factors arising from this evidence at Smith, 758 F. Supp. at 694:

> Petitioner also indicates that there was substantial "nonrecord" nonstatutory mitigating evidence which could have been presented had the teachings of Hitchcock been available at the time of Smith's trial. For example, petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: (1) had a long-term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

The Eleventh Circuit summarized the mitigating evidence as follows:

> [T]he district court . . . found that the sentencing court precluded the presentation of the following ten mitigating factors: [5] Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; [6] Smith was guilty under the felony murder doctrine; [7] a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty of the same three underlying felonies.... ... [8] [Smith] had a long-term history of alcohol and substance abuse; [9] [Smith] suffered from grand mal epilepsy; [10] [Smith] was, for all practical purposes, abandoned by his mother and abused by his grandmother; [11] [Smith] had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; [12] [Smith] was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; [13] [Smith] was known to be non-violent, meek and soft- spoken; and

> [14] [Smith] was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder. Smith, 758 F.Supp. at 694.

Smith, 61 F.3d at 817-18.

ARGUMENT

a. Introduction -- The Posture of this Case

There is no question that constitutional error infected the proceedings resulting in Frank Smith's death sentence: his jurors were precluded from considering evidence upon which they could have based a vote for life, while his attorney was constrained from developing and presenting evidence in mitigation. The District Court found that the mitigating evidence which the jury was not allowed to consider is "substantial," "significant" and "credible" and held that the constitutional error prejudiced Mr. Smith. The Court of Appeals independently reviewed the record and affirmed the District Court's findings. Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992) ("[O]ur review indicates that the record well supports the district court's findings of fact, and the district court faithfully applied the Supreme Court's and this Circuit's precedents to the facts.").

The State then petitioned for certiorari review asserting that the Eleventh Circuit's "harmless error" precedents were "confused." The State made similar assertions in its certiorari petition in Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993), a case in which the Eleventh Circuit had granted relief because of constitutional error at capital sentencing.

While the State's petitions in Smith and Duest were pending, this Court issued its decision in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993). As is this Court's practice, upon the issuance of Brecht the Court remanded Duest, Mr. Smith's case and other pending cases for consideration in light

of Brecht.[7] The Eleventh Circuit reconsidered Duest under Brecht and reinstated the grant of relief. Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993). This Court denied the Florida Attorney General's subsequent certiorari petition. Singletary v. Duest, 114 S.Ct. 1126 (1994). The District Court and the Eleventh Circuit have now reconsidered Smith under Brecht. They have found that the constitutional error had a "substantial" "injurious" effect.

This Court did not rule that the Eleventh Circuit or the District Court erred in finding that constitutional error infected the proceedings resulting in Frank Smith's death sentence. This Court did not hold that the Court of Appeals and District Court erred in finding that the jury was precluded from considering "substantial nonstatutory mitigating evidence," Smith v. Dugger, 758 F.Supp. at 696 (emphasis added), or that "in this capital case, the state trial judge prevented defense counsel from presenting ... mitigating circumstances...." Smith v. Singletary, 970 F.2d at 766 (emphasis added). This Court did not rule that the constitutional error does not warrant the granting of relief under Brecht or any other standard. Members of the Florida Supreme Court itself now rely upon "Judge Stafford's learned analysis . . . in Smith." See Meeks v. Dugger, 576 So. 2d 713, 719 (Fla. 1991).

After the remand, Judge Stafford found that the constitutional error which "infected" these proceedings was "harmful" under the Brecht/Kotteakos standard (Dist Ct. Order, Pet. App. A19). The Eleventh Circuit also found that the constitutional error caused substantial prejudice and was

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7. The practice of so remanding cases for further consideration is not intended as a comment on the merits of the case, but is followed in order to give the lower courts the opportunity to state their rulings in light of the new opinion. See Stern, Gressman, Shapiro and Geller, Supreme Court Practice (7th ed). Even so, three Justices (Justices Stevens, Blackmun and O'Connor) dissented from the order remanding the case, disagreeing that even this limited action was necessary. See Singletary v. Smith, 113 S.Ct. 1940 (1993) (Stevens, Blackmun and O'Connor, JJ.). These Justices would have denied the State's petition outright. Justice Stevens' concurrence comprised the necessary fifth vote for the plurality in Brecht.

harmful under Brecht v. Abrahamson, 113 S.Ct 1710 (1993), O'Neal v. McAninch, 115 S.Ct. 992 (1995), and Kotteakos v. United States, 328 U.S. 750 (1946). See Smith, 61 F.3d at 817-19.

The Eleventh Circuit and the District Court found that "the state trial judge prevented defense counsel from presenting" nonstatutory mitigation. Smith, 970 F.2d at 766. That the jury's consideration was restricted; that defense counsel was constrained; and that "substantial," "significant" and "credible" evidence which would have justified a vote for life was not afforded consideration are all matters which have been established by the findings and rulings of the District Court and Court of Appeals. And, as the District Court explained, this constitutional error was prejudicial under Brecht and Kotteakos:

> Applying the Kotteakos standard to the facts in this case, the court again finds that the petitioner is entitled to relief. At the very least, a grave doubt exists as to whether the Hitchcock error substantially influenced the jury's decision. As this court previously found, there was substantial, significant nonstatutory mitigating evidence available to Smith that, but for the erroneous instruction, trial counsel would have introduced for the jury's consideration. See Smith v. Dugger, 758 F. Supp. 688 (N.D. Fla. 1990) (describing the credible nonstatutory mitigating evidence available to Smith)... The erroneous instruction ... infected the sentencing process by placing a thumb on death's side of the scale. Under such circumstances, this court cannot say, with fair assurance, that the error did not have a substantial and injurious effect upon the jury's decision to recommend the death penalty.

(Dist. Ct. Order, Pet. App. A17-18) (emphasis added).

This Court's post-Brecht precedent speaks volumes to the propriety of Chief Judge Stafford's ruling. In O'Neal v. McAninch, 115 S.Ct. 992 (1995), this Court held: "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error...had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." Id. at 994. Here, Judge Stafford found that Mr. Smith was substantially prejudiced -- i.e., that

the constitutional error "was harmful under the standard announced in Kotteakos..." Dist Ct Order, Pet. App. A19. He found that the constitutional error "infected the sentencing process" and that it could not be said "with fair assurance that the error did not have a substantial and injurious effect." Id. at A17-18. The error certainly affected a "substantial right" -- i.e., the right to an individualized, reliable and fundamentally fair capital sentencing determination. In light of O'Neal, the propriety of Judge Stafford's grant of relief is not subject to serious dispute.

As the Eleventh Circuit explained:

> When reviewing trial errors for harmlessness, federal habeas corpus courts no longer utilize the Chapman "harmless beyond a reasonable doubt" standard; instead, they must apply the less onerous standard described in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). See Brecht, --- U.S. at ----, ----, 113 S.Ct. at 1714, 1722. "Hitchcock errors are 'trial errors' governed by Brecht." Horsley, 45 F.3d at 1492; see also Bolender, 16 F.3d at 1567. Therefore, we must decide whether the Hitchcock error in this case "had substantial and injurious effect or influence in determining" Smith's death sentence. Brecht, --- U.S. at ----, 113 S.Ct. at 1712 (quoting Kotteakos, 328 U.S. at 776, 66 S.Ct. at 1253).
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> The Supreme Court has recently clarified that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." O'Neal v. McAninch, --- U.S. ----, ----, 115 S.Ct. 992, 994, 130 L.Ed.2d 947 (1995). Thus, Smith points out that if we have grave doubt as to whether the Hitchcock error was harmless, we must rule in his favor. Given the district court's factual determinations concerning the wealth of mitigating evidence that was both presented and precluded, we can only conclude that the Hitchcock error in this case had a substantial effect on the outcome of Smith's sentence.

Smith, 61 F.3d at 817-19 (emphasis added).

b. **The Attorney General's Current Argument**

The Question Presented by the Attorney General states that the Eleventh Circuit has interpreted Brecht and O'Neal to require relief when there is "any doubt" about the effect of a capital sentencing error. Despite this assertion, the Attorney General does not identify a single case where the Eleventh Circuit has so held. There is no such case. To the contrary, the Eleventh Circuit has consistently denied relief under Brecht in cases where, unlike Mr. Smith's case, constitutional error did not have a "substantial" effect on the outcome of the capital sentencing proceedings. Compare Smith, 61 F.3d at 819 ("[T]he Hitchcock error in this case had a substantial effect on the outcome of Smith's sentence."), with Horsley v. Alabama, 45 F.3d 1486, 1492-93 (11th Cir. 1995) ("In the past, we have not flinched from concluding that Hitchcock errors were harmless even when applying the more strict Chapman standard for harmlessness, e.g., Demps v. Dugger, 874 F.2d 1385, 1390 (11th Cir. 1989); and we think we could so conclude here. But, considering that the Brecht rule requires substantial and injurious effect ... we can and do say with greater reason that petitioner is due no relief."), and Bolender v. Singletary, 16 F.3d 1547, 1567 (11th Cir. 1994) ("The [Brecht] test ... which derives from Kotteakos [requires a substantial effect] ... Bolender has failed to satisfy the Brecht standard.").

The Attorney General's petition asserts that the Smith court ignored its own precedents in Horsley and Bolender.[8] This assertion is inaccurate.

Two members of the Smith panel were on the Horsley panel (Judges Edmondson and Hatchett). Chief Judge Tjoflat, the third member of the Smith panel, was the author of Bolender. These Judges were well-aware of what they had held in cases decided just a few months before Mr. Smith's case.

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8. The Attorney General did not seek rehearing or en banc review in the Court of Appeals.

Indeed, the Smith opinion specifically cited to, quoted from and discussed Bolender and Horsley. See Smith, 61 F.3d at 818 and n.2 (citing Horsley -- "Hitchcock errors are 'trial errors' governed by Brecht."); id. at 818 (citing and discussing Bolender). The Smith panel provided a detailed comparison of Smith and Bolender even though the State did not rely on Bolender in its argument to the Court of Appeals. See Smith, 61 F.3d at 818 (discussing Bolender "[a]lthough not cited" by the State). The Court explained:

> In Bolender, the district court found that the sentencing court did not preclude the presentation of mitigating background evidence. Bolender, 16 F.3d at 1566. Relying on the district court's factual determination, this court concluded that "[t]he decision not to introduce the background evidence was the product of strategy," and, therefore, the sentencing court did not commit a Hitchcock violation. Bolender, 16 F.3d at 1566. The factual and procedural posture of Bolender, however, make it distinguishable. Unlike Bolender, the district court in this case specifically found that the sentencing court precluded the presentation of the above mitigating factors, and, as ... we indicated in our previous decision, "the record well supports the district court's findings of fact." Smith, 970 F.2d at 766.

Smith, 61 F.3d at 818.

Unlike the trial court in Smith (which "precluded" nonstatutory mitigating evidence), the state trial judge in Bolender "made an open invitation" for presentation of any evidence at the penalty phase. Bolender, 16 F.3d at 1564-65. Unlike the restraints on defense counsel in Smith (where "the state trial judge prevented defense counsel from presenting" nonstatutory mitigating circumstances), neither the trial judge nor defense counsel in Bolender "believed themselves to be so limited." Bolender, 16 F.3d at 1564 n.24. See also id. at 1565 ("Bolender's trial counsel was not in fact constrained in developing and introducing nonstatutory mitigating evidence..."). Unlike Smith (where the District Court found that the record was clear in demonstrating that counsel was in fact constrained), the District Court in Bolender found "that 'the record clearly refutes Bolender's

allegation that his defense counsel was precluded from presenting nonstatutory mitigating factors,' either explicitly or implicitly." Bolender, 16 F.3d at 1566 (quoting district court order). Unlike Smith (where the District Court and Court of Appeals found that the state trial judge imposed a restrictive interpretation of the law), the state court in Bolender "did not limit its consideration of mitigating factors [solely] to those outlined in the death penalty statute." Bolender, 16 F.3d at 1566. Unlike Smith (where the District Court and Court of Appeals found that the constitutional error had a substantial harmful effect under Brecht), the Bolender court found that the petitioner "failed to satisfy the Brecht standard." Bolender, 16 F.3d at 1567. See also Horsley, 45 F.3d at 1492-93 (Horsley failed to satisfy Brecht because the Hitchcock error did not have a substantial harmful effect).

The Attorney General then devotes a substantial portion of the certiorari petition to a discussion of cases where relief was denied under Brecht or Kotteakos (See Petition for Writ of Certiorari, pp 22-24). Those cases, however, have nothing to do with Mr. Smith's case.

First, not one of those cases involved the jury's being foreclosed from considering mitigating evidence at capital sentencing.

Second, a survey of those cases reveals that they raised issues which are irrelevant to the outcome in Smith under any standard. Thus, in Hardnett v. Marshall, 25 F.3d 875, 879-80 (9th Cir. 1994) (cited in certiorari petition, p. 23), the defendant challenged one comment about premeditation in the prosecutor's guilt-phase summation. The Court found the error insufficient to warrant relief because the jury found that the defendant was not guilty of premeditated murder -- as the "statement only went to prove premeditation, and the jury did not find it proven, the prosecutor's misconduct did not infect the whole trial." Id. at 880. In Kontakis v. Beyer, 19 F.3d 110, 117 (3rd Cir. 1994) (cited in certiorari petition, p. 22), the Court rejected a challenge to certain guilt-phase jury

instructions because "[t]he instruction(s) would have done nothing more than place a burden on Kontakis to establish a defense not even in issue in the case."

In Anderson v. Butler, 23 F.3d 593, 596-97 (1st Cir. 1994) (cited in certiorari petition, p. 23), the defendant's challenge was that the trial judge substituted the word "would" for "might" in one part of several guilt-phase malice instructions. The Court ruled that "[e]ven assuming, for argument's sake, that the erroneous substitution of 'would' for 'might' in the instructions created an impermissible presumption, we deem it highly unlikely that a reasonable juror would have understood the instructions, overall, as directing that malice was to be presumed," id. at 596, and that "we simply do not believe that a one-word deviation from the norm spoiled the trial's overall integrity." Id. at 597. In Libby v Duval, 19 F.3d 733, 740 (1st Cir. 1994) (cited in certiorari petition, p. 23), the Court rejected a challenge to guilt-phase jury instructions on "sudden combat" because "the defense never specifically argued a sudden combat theory to the jury." In Madden v. Collins, 18 F.3d 304, 309-10 (5th Cir. 1994) (cited in certiorari petition, p. 22), the Court held that a prosecutor's passing guilt-phase comment on the defendant's failure to testify ("[t]here's only one person here that knows why") was insufficient to warrant relief as the statement was made in relation to specific evidence that had been introduced at the trial and in response to the defense's closing argument on that evidence.

Latine v. Mann, 25 F.3d 1162, 1166-68 (2nd Cir. 1994) (cited in certiorari petition, p. 23-24), rejected a challenge to the admission of an out-of-court statement at the guilt phase because the statement was reliable, trustworthy, fell within a firmly rooted hearsay exception and was consistent with, corroborative of and cumulative to other evidence introduced at the trial. Robinson v. Arvonio, 27 F.3d 877, 887 (3rd Cir. 1994) (cited in certiorari petition, p. 23), involved a claim that the prosecution withheld information about a witness's immunity agreement. The Court ruled that the claim was insufficient to warrant relief because "the prosecutor here, in his opening statement,

acknowledged his promise to tell the sentencing judge of [the witness's] cooperation" and "on cross-examination, [the witness] admitted he had been promised immunity." Id. at 887 (emphasis added).

Finally, Smith v. Dixon, 14 F.3d 956, 977-79 (4th Cir. 1994) (cited in certiorari petition, p. 22), rejected a claim that only a state court could conduct "harmless error" analysis regarding an aggravator challenged as vague. Id. at 977-79. The Court then found, "beyond a reasonable doubt," see id. at 980 n.13 ("our decision would be the same" under Kotteakos or Chapman v. California, 386 U.S. 18 (1967)), that the jury would have found the crime "heinous" had additional language been included in the instruction, id. at 980-81, and therefore "it is unnecessary to address" whether the challenged aggravator had a substantial effect on the sentence. Id. at 981 n.14.

None of these cases are even arguably related to Mr. Smith's case, where the District Court and the Court of Appeals found that the jury was prevented from considering and defense counsel from presenting "substantial," "significant" and "credible" mitigating evidence. None of these cases involved error which "infected" the proceedings or undermined the reliability of the death sentence. (Dist Ct Order, Pet. App. A17-19.)

The Attorney General's petition also asserts that trial counsel was not inhibited. The District Court found as a matter of fact that counsel was constrained. See Smith, 758 F. Supp. at 694-96; Dist. Ct. Order, Pet. App. A17-18. The Court of Appeals found that "the record well supports the district court's findings of fact," Smith, 970 F.2d at 766, and that the District Court's findings were not clearly erroneous. Smith, 61 F.3d at 818 n.1. This Court does not disturb District Court findings of fact that have support in the record. Amadeo v. Zant, 486 U.S. 214 (1988).

In affirming the District Court's findings, the Court of Appeals held: "In this capital case, the state trial judge prevented defense counsel from presenting ... mitigating circumstances not listed in the Florida death penalty statute." Smith v. Singletary, 970 F.2d at 766. Chief Judge Stafford found,

inter alia, that "[t]he record makes it evident that counsel developed both his strategies as well as his arguments under the constraints of that jury instruction"; that "the record indicates that trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction"; that "defense counsel's tactical decisions were made in the context of the law as it then existed;" that trial counsel's affidavit "describing how his strategies were limited by the instruction which he knew would be given to the jury" and the Court's independent findings from the record demonstrated that counsel's efforts were constrained[9]; that "there was nonstatutory mitigating evidence in this case which ... could have been presented .... had the erroneous jury instruction not been given"; that the record reflects "that counsel's strategy would have been different had the case been tried post-Hitchcock"; that "[u]nder such circumstances" the Court could not accept the State's premise that "the denial of petitioner's ineffective assistance of counsel claim should, ipso facto, be used to deny petitioner's Hitchcock claim"; and that "substantial mitigating evidence exists in this case." Smith, 758 F. Supp. at 694-96.

Chief Judge Stafford also explained that his denial of relief on the ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984), was not based on a lack of substantiality of the mitigating evidence. Smith, 758 F.Supp. at 694. The claim of ineffectiveness had been denied "without addressing the prejudice prong of the Strickland test." Smith, 758 F.Supp. at 694 (emphasis added). The eighth amendment claim requires a different analysis:

> Mindful that claims under Strickland [v. Washington] and Hitchcock are separate and distinct, the court notes that defense counsel's tactical decisions were made in the context of the law as it then existed. The standard jury instruction promulgated under such law informed jurors that "the mitigating circumstances which you may consider, if established by the evidence, are these [listing the seven statutory mitigating factors]." The record makes it evident that counsel developed both his strategies as well as his arguments under the

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9. The Respondent conceded that trial defense counsel's affidavit is truthful. See Petition for Writ of Habeas Corpus, pp. 127-29 (quoting transcript).

> constraints of that jury instruction. To do so was reasonable at the time. Only later did the Supreme Court decide that it was error for the trial court to give the constraining instruction. Hitchcock, 481 U.S. at 393, 107 S.Ct. at 1821, 95 L.Ed.2d at 347. That later decision did not make counsel's prior performance ineffective under Strickland. It did, however, make it necessary for this court to now determine whether the erroneous instruction affected the jury's decision as to penalty. To make that determination, the court must look at the various types of nonstatutory mitigating factors which either were presented, or could have been presented, to the jury.

Smith, 758 F. Supp. at 695.

"[T]his court cannot merely ignore the evidence" because of the ruling on the ineffectiveness claim. Id. "Perhaps the court would think differently if there were reason to believe that counsel's strategies were not affected by the erroneous instruction." Smith, 758 F.Supp. at 695. Judge Stafford found, however, that there was no such reason. Id. He explained that Mr. Smith's case was unlike the situation in Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), where "there was no evidence that counsel's strategies would have been different had she defended the case post-Hitchcock ... Here... the situation is different." Smith, 758 F.Supp. at 695 (emphasis added).

> In Smith's case, the record indicates that trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction. In fact, as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors. In addition, he has filed an affidavit describing how his strategies were limited by the instruction which he knew would be given to the jury.

Smith, 758 F.Supp. at 695-96.

In reviewing the case under Brecht/Kotteakos, Judge Stafford's post-remand Order reiterated:

> As this court previously found, there was substantial, significant nonstatutory mitigating evidence available to Smith that, but for the erroneous instruction, trial counsel would have introduced for the jury's consideration. See Smith v. Dugger, 758 F. Supp. 688 (N.D. Fla. 1990) (describing the credible nonstatutory mitigating evidence available to Smith). To be sure, a small portion of the nonstatutory

> mitigating evidence was, in fact, presented to the jury as trial counsel tried to stretch the statutory mitigating factors to encompass what were, in essence, nonstatutory factors. The greater portion of the nonstatutory mitigating evidence, however, was not introduced at trial because of the constraints imposed upon the entire sentencing process by the Hitchcock error. Indeed, under the instruction given by the trial court, nonstatutory mitigating evidence could not be weighed by the jurors as they considered Smith's fate, whether or not counsel introduced, or the jury heard, such evidence. The erroneous instruction thus infected the sentencing process by placing a thumb on death's side of the scale. Under such circumstances, this court cannot say, with fair assurance, that the error did not have a substantial and injurious effect upon the jury's decision to recommend the death penalty.

Dist Ct Order, Pet. App. A17-18 (emphasis added).

The State's argument is foreclosed by the District Court's findings of fact and the actual record in this case.

Contrary to the State's final assertion, the District Court did consider the nature of the offense, the aggravating factors and the State's arguments. It concluded that "under the law ... the State of Florida is required to do more than point ... [to the] crime in order to defeat Petitioner's claim for relief." Smith, 758 F.Supp. at 696. The right to a capital sentencing proceeding at which the jury is allowed to consider and "give effect" to mitigation is at the core of this Court's holdings that capital sentencing proceedings must be reliable and individualized. See Penry v. Lynaugh, 109 S.Ct. 2934, 2951 (1989); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); McKoy v. North Carolina, 110 S.Ct. 1227, 1234 (1990). "[R]espect for humanity," after all, "requires consideration of the character and record of the individual offender" and of the offender's actual culpability in the offense. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The constitutional error in this case abrogated these substantial rights. As the District Court found: "(1) Hitchcock error infected Smith's

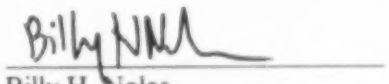
sentencing proceeding; and (2) such error was harmful under the standard announced in Kotteakos, 328 U.S. at 750." Dist Ct Order, Pet. App. at A18-19.

Chief Judge Stafford's findings of fact are not "clearly erroneous." The error which infected these capital sentencing proceedings was "harmful" under Brecht.

CONCLUSION

The Attorney General's petition presents neither a substantial nor a debatable question. The petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 5th day of January, 1996.

Attorney